

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

UNITED STATES OF AMERICA     )  
                                          )  
          v.                            )     1:11-cr-00205-JAW-9  
                                          )  
KELVIN MALLY                        )

**ORDER STAYING ORDER OF RELEASE**

Having original jurisdiction of the alleged offense in this case, the Court further stays a release order from the Southern District of New York until its completion of a review of the release order under 18 U.S.C. § 3145(a)(1).

**I. STATEMENT OF FACTS**

**A. Procedural History**

On January 12, 2012, a federal grand jury issued a superseding indictment against nine defendants, including Kelvin Mally, for an alleged violation of 21 U.S.C. § 841(b)(1)(B), conspiring to distribute cocaine and cocaine base, and against Mr. Mally individually for possession of a firearm in furtherance of this drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A). *Superseding Indictment* at 1, 3 (ECF No. 81). Count One and Count Four of the superseding indictment allege that Mr. Mally committed these crimes “in the District of Maine.” *Id.* The next day, the Magistrate Judge issued an arrest warrant for Mr. Mally. *Arrest Warrant* (ECF No. 111). On August 16, 2013, Mr. Mally was arrested in New York City by the New York City Police. *Arrest Warrant* (ECF No. 526).

On August 19, 2013, the Government moved for a review of a release order issued in the Southern District of New York. *United States’ Mot. for Review of*

*Release Order* at 1-3 (*Gov't's Mot.*) (ECF No. 529). In its motion, the Government represents that on August 16, 2013, Mr. Mally appeared before Magistrate Judge Ronald Ellis of the Southern District of New York for an initial appearance and detention hearing. *Id.* at 2. The Government states that Magistrate Judge Ellis released Mr. Mally on the following conditions:

- 1) The posting of a personal recognizance bond in the amount of \$100,000 to be signed by four individuals—two financially responsible persons and two moral suasion persons;
- 2) Strict pretrial supervision and drug testing;
- 3) Travel restricted to the Southern and Eastern Districts of New York, the District of Maine, and intervening districts necessary for travel; and
- 4) The obligation to report for all court appearances in the District of Maine.

*Id.* at 2. The Magistrate Judge stayed the release order until the close of business on Monday, August 19, 2013 to permit the Government to appeal. *Id.* The Government appeals the Magistrate Judge's order. *Id.*

## **B. The Government's Position**

The Government asks this Court to stay the release order arguing that it “should be revoked and that Mr. Mally should be detained pending the trial of this case.” *Id.* at 1-2. Further in the motion, the Government requests the Court to “order [that] the defendant remain in detention until he is returned to Bangor for his initial appearance and arraignment, at which time the court can review the evidence and determine if there are conditions of release that could assure his appearance in this Court.” *Id.* at 3.

## II. DISCUSSION

Title 18, Section 3145(a) of the United States Code states:

If a person is ordered released by a magistrate, or by a person other than a judge of a court having original jurisdiction over the offense and other than a Federal appellate court—

- (1) the attorney for the Government may file, with the court having original jurisdiction over the offense, a motion for revocation of the order or amendment of the conditions of release. . . .

18 U.S.C. § 3145(a), (a)(1). Because it is “the court having original jurisdiction over the offense,” *id.*, venue for the Government’s motion to stay lies in this Court, *United States v. Evans*, 62 F.3d 1233, 1236 (9th Cir. 1995) (“A defendant has a constitutional right to be tried in the state and district where the crime is alleged to have been committed”); *see also United States v. Vega*, 438 F.3d 801, 803-04 (7th Cir. 2006); *United States v. Cisneros*, 328 F.3d 610, 614-16 (10th Cir. 2003); *United States v. El-Edwy*, 272 F.3d 149, 152-54 (2d Cir. 2001); *United States v. Torres*, 86 F.3d 1029, 1031 (11th Cir. 1996). Section 3145(a) “places the review of the magistrate judge’s order in the province of the district court where the prosecution is pending, and where the bail status of the defendant ultimately will be determined during the course of that trial.” *Evans*, 62 F.3d at 1237. Although there is no First Circuit Court of Appeals authority on this question, the district court of Puerto Rico just recently adopted the *Evans* court’s view. *United States v. Godines-Lupian*, No. 11-367 (GAG), 2011 U.S. Dist. LEXIS 116040, \*4-5 (D.P.R. Oct. 5, 2011) (holding that, under § 3145(a), it is the district court where prosecution is pending, not that of arrest, that can review a magistrate’s order). “A necessary adjunct to the

authority to review is the authority to stay.” *United States v. Trinidad-Acosta*, No. 1:11-mj-00185-MJK, 2011 U.S. Dist. LEXIS 130817, \*4-5 (D. Me. Nov. 9, 2011).

The Court agrees with the Government that the Magistrate Judge’s release order must be stayed to allow this Court to review the propriety of pretrial release. The Government represents that Mr. Mally “does have ties to the Dominican Republic.” *Gov’t’s Mot.* at 2. It also states that Mr. Mally’s two half-brothers, Alfarabick Mally and Jowenky Nunez, have pleaded guilty to their participation in the drug trafficking conspiracy and that Mr. Mally is likely aware that the Court sentenced Alfarabick Mally to eighty-four months incarceration and that Mr. Nunez awaits sentencing. *Id.* at 2-3. In addition, the Government states that although he was certainly aware of his indictment, Mr. Mally has failed to contact the authorities. *Id.* at 3. Thus, the Government emphasizes that Mr. Mally presents a significant flight risk and, given the seriousness of the charges filed against him, is a danger to the community. *Id.*

In view of the Government’s concerns, the Court concludes that the wiser course is to stay the New York release order until Mr. Mally is brought to the District of Maine and until the Court has an opportunity to make its own assessment as to whether pretrial release is warranted and, if so, on what terms. The Court does not grant the portion of the Government’s motion that requests the Court to retain the Defendant in custody pending trial and reserves further disposition of the pretrial release issue until the Defendant is brought to the District of Maine.

### III. CONCLUSION

The Court GRANTS in part the Government's Motion for Review of Release Order (ECF No. 529) and ORDERS the United States District Court for the Southern District of New York's Order of Release, dated August 16, 2013, STAYED pending review of the Order pursuant to 18 U.S.C. § 3145(a)(1).

SO ORDERED.

/s/ John A. Woodcock, Jr.  
JOHN A. WOODCOCK, JR.  
CHIEF UNITED STATES DISTRICT JUDGE

Dated this 19th day of August, 2013

**Defendant (9)**

**KELVIN MALLY**

**Plaintiff**

**USA**

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